

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE**

NOVEL DRUG SOLUTIONS, LLC, and  
EYE CARE NORTHWEST, PA,

Plaintiffs,

v.

HARROW HEALTH, INC.,

Defendant.

Civil Action No. 18-0539-MN

HARROW HEALTH, INC.,

Defendant/Counterclaim Plaintiff,

v.

NOVEL DRUG SOLUTIONS, LLC and  
EYE CARE NORTHWEST, PA,

Plaintiffs/Counterclaim Defendants

and

DR. JEFFREY LIEGNER and  
J. SCOTT KAROLCHYK,

Counterclaim Defendants.

**DEFENDANT HARROW HEALTH INC.'S SUPPLEMENTAL REPLY TO  
DEFENDANT'S RULE 12(b)(6) MOTION TO DISMISS OR IN THE ALTERNATIVE  
MOTION TO STRIKE COUNT III OF PLAINTIFFS' THIRD AMENDED COMPLAINT**

August 7, 2020

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In Plaintiffs' Answering Brief in Opposition to Harrow Health, Inc.'s Motion to Dismiss (D.I. 236 ("Answering Br.")), Plaintiffs argue that they did not misrepresent to the Court that their damages theory would be the same under breach of contract as it was for unjust enrichment. (*See* Answering Br. (D.I. 236) at 18.) Plaintiffs claim that they are still seeking disgorgement even though they removed "disgorgement" from their prayer for relief. Plaintiffs point to the Third Amended Complaint saying they "specifically allege that their damages 'are set forth in their May 13, 2020 expert report, and any future supplements thereto.'" (*See id.* (citing the Third Amended/Supplemental Complaint (D.I. 227)).) Plaintiffs also claim that "this expert report, served prior to the Court's June 4, 2020 Order, identifies Plaintiffs' damages as *disgorgement of Defendant's profits* resulting from its unauthorized and impermissible use of the 'Technology' and 'Assets' post-termination." (*See id.* (emphasis added).)

On July 30, 2020, Plaintiffs' damages expert, Michael Napolitano was deposed. Contrary to Plaintiffs' claim, Mr. Napolitano testified that he was *not* providing an opinion on disgorgement damages.<sup>1</sup> (*See* Rough Deposition Transcript of Michael Napolitano, attached as Exhibit 1 to the Declaration of Neil A. Benchell ("Napolitano Tr.") at 91:10-13.) Nor is Mr. Napolitano's opinion a calculation of Harrow's profits. (*See id.* at 250:9-13.)

For the reasons set forth in Harrow's Opening and Reply Briefs, Harrow respectfully requests that Count III of Plaintiffs' Third Amended/Supplemental Complaint be dismissed or stricken.

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<sup>1</sup> Mr. Napolitano also testified that his opinion was not an analysis of expectation damages or Plaintiffs' lost profits. (*See* Napolitano Tr. at 59:15-22)

August 7, 2020

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/s/ James M. Lennon

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